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IN THE

Supreme Court of the United States

No. [redacted] 47 — 61

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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INDEX

	PAGE
DISCUSSION	1
CONCLUSION	8

AUTHORITIES

Cases

Federal Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160 (1927)	5
Federal Trade Commission v. *Dilger*, 276 F. 2d 739 (7th Cir. 1960), *cert. denied*, 364 U. S. 882 (1960)	8

Miscellaneous

H.R. 3563, 87th Cong., 1st Sess. (1961)	8
H.R. 10049, 86th Cong., 2nd Sess. (1960)	8
H.R. 2325, 86th Cong., 1st Sess. (1959)	8
H.R. 8657, 86th Cong., 1st Sess. (1959)	8

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PETITIONER'S REPLY BRIEF

Discussion

The Government, in its memorandum in opposition, attempts to describe a large corporation seeking to delay and impede the progress of an investigation, lawfully and properly conducted by the Federal Trade Commission.

The true fact is that this was a case in which the Commission was not only so careless in the drafting of its orders and so unmindful of the rights of the investigated corporations that the bulk of the questions asked by the Commission could not be judicially enforced,[1] but one in which, after such orders were served, the Commission refused either to vacate or modify the orders, so that the

1. Record, p. 14a. "Record", as used herein, has the meaning stated in footnote 1, at page 2, of the petition for writ of certiorari.

numerous errors might be corrected, and denied all of petitioner's requests for conferences with Commission representatives for the purpose of obtaining some modification of the orders by deleting objectionable questions.

Subsequent to the voluntary submission to the Commission of a large volume of information relating to petitioner's acquisitions of the stocks or assets of other corporations and 213 separately marked documents in response to the Commission's subpoena duces tecum in this same investigation,[2] petitioner and its acquired companies were served with 9 separate Commission orders containing a total of 358 separate questions. In petitioner's view, and as the District Court later held, most of these questions were defective because vague and uncertain[3] or duplicative of information previously furnished. In addition, petitioner objected to other questions on the ground that they required the production of privileged records, principally retained file copies of reports to the Bureau of the Census.

Petitioner promptly moved the Commission to have the defects in the Commission's orders corrected. The Commission, however, denied all of petitioner's motions and all of its requests for an opportunity to be heard orally.

In disposing of petitioner's motions, the Commission refused to modify its orders so as to eliminate a single objectionable question. In the Commission's Memorandum Opinion dated May 6, 1959 the Commission recognized

2. Record, pp. 121-134.

3. In our brief in the District Court, we noted that "most of the questions were reasonably straightforward". In every brief of the Government this language has been quoted, as it is in the Government's answering memorandum here, p. 10. Petitioner has never contended that all or even a majority of the questions were vague and uncertain. However, although some were "reasonably straightforward", many of these questions were objectionable on grounds other than vagueness.

that some questions in its orders required duplication of information previously furnished, but nevertheless refused to eliminate them.[4]

After this litigation was commenced, the Government, consistent with the Commission's position, insisted on an "all-or-nothing" compliance, and demanded answers to the entire set of questions, the good as well as the bad. In its brief, in the Court of Appeals, the Government said (at pages 17, 18):

> "It could not be seriously contended that such forfeitures for failure to file required reports could be avoided by a pro-forma filing of a report which patently did not respond to the specific questions propounded therein, or which deliberately refused to answer *some* of the questions. * * *" (Italics ours.)

Thus, in order to test the validity and propriety of questions considered objectionable, petitioner was obliged to refuse to comply with all of the 9 orders as served by the Commission. Petitioner's refusal to comply was, admittedly, not "a simple oversight or an honest mistake in a good-faith attempt to comply with the Commission's order"[5]. It was a deliberate step taken in order to obtain judicial review of the questions claimed to be objectionable.[6] Whether petitioner awaited mandamus proceedings or instituted proceedings under the Declaratory Judgment Act or Administrative Procedure Act, in

4. Record, p. 170.

5. The Government places special emphasis on this observation of the Court of Appeals (see Memorandum in Opposition, p. 9).

6. That petitioner urged, as a separate ground of objection to the Commission's questions, that the Commission was without power to issue the orders did not obviate the necessity to resist enforcement of the entire set of questions in each separate order so that the validity of some of the questions could be judicially determined.

either case, it was necessary to refuse to comply as a condition to judicial review.

The petitioner's non-compliance was in no sense contumacious, but was due to the Commission's refusal to eliminate questions which petitioner, and later the District Court, found objectionable.

The Government's memorandum (at page 5) and the opinion of the Court of Appeals below attempt to give the erroneous impression that petitioner completely ignored the availability of the Declaratory Judgment Act or the Administrative Procedure Act to challenge in the courts the validity of the Commission's orders. Both the Government and the Court below failed to note the correspondence between petitioner's counsel and the Commission which preceded the commencement of this action and in which petitioner's counsel requested the Commission to submit to the jurisdiction of the District Court and answer petitioner's proposed complaint for a declaratory judgment. The written reply of the Commission's general counsel stated:[7]

> "In the event such suit should be filed, you are advised that we would be compelled to note the probable lack of jurisdiction in the Court upon the authority of *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160 (1927). See also *Federal Trade Commission* v. *Maynard Coal Co.*, 22 F. 2d 873 (C.A.D.C., 1927)."

The general counsel stated a willingness to discuss the matter at a conference, but before a meeting could be arranged the Government commenced this action.[8] It may also be noted that the Court of Appeals below held,

7. Record, p. 36.
8. Record, p. 22.

for the first time, that *Claire Furnace,* which the Commission's general counsel relied on as authority for the nonavailability of declaratory relief, had been overruled. (See Appendix to petition, pp. 16a, 17a).

The District Court vindicated petitioner's position. District Judge Ryan, after a trial in which all of the Commission's questions were carefully and fully reviewed, found that only 130[9] of the questions were enforceable and that the remaining questions were not required to be answered because they were unreasonably vague or because they had previously been answered in the documents and information furnished the Commission before the Government commenced this action. The Government did not appeal from the portion of the District Court's judgment specifying the questions to be answered.

The Government's memorandum is also inaccurate in its statement as to the time when petitioner had actually answered the questions which the District Court found to be duplicative of information and records previously furnished to the Commission by petitioner. The Government would have it appear that many of the items were answered *after* the service of the Commission's notices of default. For example, at page 4, reference is made to "a post-trial memorandum in the District Court * * * referring to certain documents it had submitted both before and after the default date * * *".[10] The fact is that the only document furnished to the Commission after the service of the notices of default was a copy of petitioner's pro-

9. The specific questions which the District Court ordered answered are listed in the District Court's opinion (Record, p. 150, 181 F. Supp. 862, 868) and in the provisions of the judgment (Record, pp. 152-156).

10. These are in addition to items claimed to have been answered in the "post-trial memorandum" (Memorandum in Opposition, page 4).

spectus dated October 14, 1959 relating to the acquisition by petitioner of the stock of Cornell Paperboard Products Co.[11] This acquisition was not one of those which was the subject of the Commission's investigation, but was furnished voluntarily in petitioner's belief that the Commission should promptly have a proper record of the facts regarding each acquisition made by petitioner and determine promptly whether any such acquisitions presented any question under Section 7 of the Clayton Act.

The 130 questions which were ordered enforced included questions requiring the furnishing of petitioner's retained file copies of census reports. Petitioner unsuccessfully contended before the Commission and in the Courts below that the Commission was without power to require the production of these reports. The Government now recognizes that an important and substantial question of federal law is presented with respect to this particular group of questions and agrees that the writ of certiorari should be granted on the question. It argues, however, that the writ of certiorari should not be granted to review any of the other questions raised in the petition, including the novel, important and substantial question of the Government's right to the forfeitures as claimed.

We respectfully submit that the questions are inextricably related and that the Government's position is unfair and unreasonable.

The relatively small number of the total questions to which the District Court directed that answers be made—including the 21 questions relating to census reports—were, after all, questions for the same investigative purpose as the relatively large number of questions which the District Court eliminated. If these census questions

11. Record, p. 128.

are held to be unenforceable, the proportion of proper questions in this Commission's investigation will have been even further reduced.

The Government takes the position that forfeitures are properly assessable under the third paragraph of Section 10 of the FTC Act because "petitioner made a 'wrong guess on a disputed issue of law'" (Government's Memorandum, p. 10). We urge that most of petitioner's objections were sustained by the District Court and that most of petitioner's "guesses" on the law were correct,—not "wrong".

If petitioner prevails on the right of the Commission to confidential copies of census reports, it will have demonstrated even further that the overwhelming majority of the "wrong guesses" were made by the Commission and not by petitioner. The disposition of the census questions may, therefore, have an important bearing on the question of the Commission's right to forfeitures for the refusal to comply with the Commission's orders.

In its memorandum the Government does not show any valid reasons why the writ of certiorari should not be granted to review the other questions stated in the petition. The Government mentions only three issues (memorandum, p. 6), thereby ignoring entirely the important question concerning the construction and application of Section 6(c) of the Administrative Procedure Act specified in Question 2 (at page 2 of the petition) which this Court has never previously determined.

Moreover, in the District Court the Government frankly took the position that the complaint presented "a test case"[12] brought to obtain a judicial interpretation of the

12. Record, pp. 17, 142. "Record" as used herein is defined in footnote 1 (page 2) of the petition for writ of certiorari.

Commission's investigative (pre-complaint) powers, never previously asserted under Section 6(b) of the Federal Trade Commission Act (181 F. Supp. 862, 864). The Government now retreats from its prior position and urges this Court not to review this novel and important question of federal law, and to confine the review in this Court to the single issue which the Government (having failed to obtain a writ of certiorari in *Federal Trade Commission* v. *Dilger*[13]) now desires to litigate.

Conclusion

The Government's memorandum does not state any persuasive reasons why the petition for the writ of certiorari should not be granted to review all of the questions which this Court has not previously settled. The writ should issue as requested and all the questions stated in the petition should be reviewed and determined by this Court. The settlement in this Court of the issues raised by the petitioner will clarify for the Commission, the federal courts, the Congress and the bar questions which have an important bearing on the proper procedure in pre-complaint investigations by the Commission to determine whether one of the antitrust laws, Section 7 of the Clayton Act, has been violated. Compare pending "pre-merger notification" bill in the present Congress, H.R. 3563, 87th Cong., 1st Sess. (1961); see also bills in previous Congresses, H.R. 10049, 86th Cong., 2d Sess. (1960); H.R. 2325, 86th Cong., 1st Sess. (1959); H.R. 8657, 86th Cong., 1st Sess. (1959).

Respectfully submitted,

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13. 276 F. 2d 739 (7th Cir. 1960), *cert. denied*, 364 U. S. 882 (1960).